

# 2022 LAW JOURNAL

At *Business North Carolina's* request, top lawyers were asked to provide insight into key business legal issues. Business law is complex, but these experts bridge the gap on two topics: the power of the New York Convention in international arbitration cases and how North Carolina and the business community can benefit from the increasing interest of big-city dwellers and investors in smaller cities and rural areas. Three talented Tar Heel lawyers share their knowledge on these issues in this report.

## **THE POWER OF THE NEW YORK CONVENTION — WHY NORTH CAROLINA BUSINESSES SHOULD TAKE ADVANTAGE OF IT** 58

BY MICA NGUYEN WORTHY AND KAYLA N. MCDANIEL

*Cranfill Sumner LLP*

## **REAL ESTATE DEVELOPMENT IN THE FACE OF RURAL MIGRATION** 60

BY KATIE DOWELL, *Raleigh Real Estate Law*

# THE POWER OF THE NEW YORK CONVENTION

WHY NORTH CAROLINA BUSINESSES SHOULD TAKE ADVANTAGE OF IT.



**BY MICA NGUYEN WORTHY  
AND KAYLA N. MCDANIEL**  
Cranfill Sumner LLP

**T**he best markets for many of our business clients in North Carolina are overseas or online, with customer bases spread across the world. As they grow their business on a global scale, they inevitably grow concerned with being able to “hold the other side” to the deal. International arbitration is one powerful tool businesses engaged in the global economy have to mitigate this risk. When drafted properly in the parties’ contract, a North Carolina company can file a claim in arbitration, have it heard and adjudicated in North Carolina, and then be able to enforce the arbitral award in almost any country in the world where the other side has assets.

The enforcement of arbitral awards is based on a treaty called the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The United States is a contracting state to the New York Convention along with about 168 other countries and territories.

## THE NEW YORK CONVENTION APPLIED IN NORTH CAROLINA-FOREIGN AWARDS ENFORCED.

On June 24, 2022, the Fourth Circuit Court of Appeals affirmed the North Carolina federal court’s ruling in *Reddy v. Buttar*, enforcing a Singaporean arbitration award under the New York Convention, against a citizen and resident of North Carolina. The plaintiff Rachan Reddy initiated arbitration proceedings against the defendant Rashid Buttar after a dispute arose concerning the sale of real property in the Philippines. The parties executed a purchase agreement (Agreement) under which Buttar was to sell Reddy shares of companies, which purportedly owned an island in the Philippines, for \$3 million. Reddy paid several advances totaling \$1.5 million, as well as \$50,000 for taxes. Reddy later alleged that Buttar had breached the Agreement’s warranty of title and demanded a refund of \$1.5 million. However, Buttar refused and instead sought to enforce the Agreement and obtain the remainder of the purchase price, along with applicable fees and costs, for a total of \$1.99 million.

Pursuant to the parties’ Agreement, Reddy commenced arbitration in Singapore, although Buttar objected on the basis that he had not signed the Agreement. Thereafter, Buttar failed to attend the arbitration hearing. After reviewing evidence including emails between Buttar and Reddy, the arbitrator found both parties signed the Agreement, and enforced it against Buttar for \$1.55 million, along with nearly \$500,000 in legal fees and costs.

When Reddy sought to enforce the award in the Western District of North Carolina under the New York Convention, Buttar moved to dismiss. The District Court found Buttar’s arguments unpersuasive and denied his motion to dismiss before ultimately granting Reddy’s motion for summary judgment to enforce the award.

Buttar appealed to the Fourth Circuit and argued the District Court lacked subject matter jurisdiction because the New York Convention required an agreement to be in writing and signed



by the parties to be enforceable. However, the Fourth Circuit disagreed, and held the specific written-and-signed requirements went to the merits of establishing an award's enforceability under the New York Convention, rather than subject matter jurisdiction.

Buttar also argued the District Court lacked general personal jurisdiction over him as he had moved to New Zealand prior to Reddy filing suit. After conducting jurisdictional discovery, the District Court concluded Buttar had *not* overcome the presumption that general personal jurisdiction existed over him in North Carolina. Factors weighing in favor of general jurisdiction included Buttar's involvement in multiple business ventures in the state, maintenance of numerous local utility accounts and addresses, receipt of legal documents within the state, and listing of a local address on his sole bank account. Buttar also maintained North Carolina medical and pharmacy licenses and was registered to vote in the state.

Finally, the Fourth Circuit rejected Buttar's contention that the arbitration agreement was a forgery, finding no evidence to support this claim. Rather, the evidence demonstrated that Buttar attempted to enforce the purchase price against Reddy using the very same agreement and only alleged it was false (or a forgery) after Reddy initiated arbitration proceedings against him. Noting that an arbitrator's findings of fact are entitled to deference, the Fourth Circuit upheld the District Court's opinion in its entirety.

The *Reddy* decision is an example of the powerful enforcement powers that come with international arbitration awards under the New York Convention.

### **TIME FOR NORTH CAROLINA BUSINESSES TO TAKE ADVANTAGE OF THE NEW YORK CONVENTION.**

Recent cases have shown examples of the enforcement of foreign arbitral awards in North Carolina, which means it is time for North Carolina businesses to take advantage of this powerful tool as well.

In a prime example of how powerful the New York Convention can be, the

federal court in the District of Columbia confirmed and enforced a \$27.4 million arbitral award against the Belize government in *BCB Holdings Ltd. v. Gov't of Belize*. On August 18, 2009, the petitioners obtained an arbitral award against the Government of Belize (GOB) before the London Court of International Arbitration. The petitioners sought enforcement of the award in Belize, but Belize's highest court ruled the award was invalid and unenforceable as "repugnant to public policy."

On July 1, 2014, the petitioners filed a confirmation petition in the federal court in the District of Columbia under the New York Convention. The District Court confirmed the award for about \$27,430,000. The GOB subsequently issued legislation that made it a criminal offense to seek enforcement of an "unlawful" judgment against it. The petitioners filed a second action in the federal court in D.C. seeking an injunction to prevent the GOB from interfering with their collection efforts. The District Court ultimately held it was unnecessary to rule on the injunction because property of a foreign state located in the United States "is not immune from attachment" from the judgment being enforced against it. So, the petitioners could collect on the GOB's assets located in the U.S. The GOB's refusal to enforce the award in Belize did not prevent it from being enforced in the U.S. or any other jurisdiction that was a signatory to the New York Convention.

The New York Convention can be a powerful tool, even in the face of a foreign government's refusal to recognize an arbitral award and legislation to criminalize its enforcement. Using international arbitration will afford North Carolina businesses the right to seek enforcement of their awards in any New York Convention contracting state.

### **PRACTICE TIPS FOR NORTH CAROLINA BUSINESSES**

In reviewing and drafting international sales and distributor contracts, we recommend the use of well-recognized arbitral institutions for the dispute resolution clause. Doing so not only provides the company with the potential enforcement power described in this

article but also shows the counterparty that the North Carolina company is sophisticated in international contracts and willing to resolve disputes efficiently and effectively. We often recommend clients review the AAA-ICDR "Clause Builder" tool or stick to the "model clauses" published by international arbitration institutions, like the International Chamber of Commerce (ICC).

Of course, every transaction may be sufficiently unique to call for different terms to be negotiated. When drafted properly, North Carolina businesses will be able to enforce arbitral awards across the globe with the power of the New York Convention. ■



#### **MICA NGUYEN WORTHY**

*Mica Nguyen Worthy serves as legal counsel to clients in the aviation and global supply chain industries. As a Certified Global Business Professional, Mica has a specific focus on assisting global clients with their international operations including trade issues, international contracts, trade credit payment disputes, international arbitration, and dispute resolution. Mica has been recognized by North Carolina Super Lawyers® in the field of Civil Litigation and maintains an AV rating with Martindale Hubbell.*

#### **KAYLA N. MCDANIEL**

*Kayla N. McDaniel concentrates her practice on employment, civil rights, and government liability defense for both public and private entities. Kayla has effectively represented private and municipal entities facing claims for wrongful termination, retaliation, hostile work environment, breach of contract, and discrimination under Title VII, REDA, ADA, ADEA, FLSA, and FMLA.*

# REAL ESTATE DEVELOPMENT IN THE FACE OF RURAL MIGRATION



**BY KATIE DOWELL**

Raleigh Real Estate Law

**T**he recession of 2007 saw unprecedented numbers of people move to urban centers and metropolitan areas in search of employment and housing. The post-pandemic market tells a different story presenting a unique opportunity for commercial and residential real estate development.

COVID-19 transformed American society. It sent us to work from our couches, made us cancel our travel plans, and led us to avoid social interaction with all but a select few. But it also changed the employment landscape and caused a sharp shift in personal values. It taught us to embrace the availability of remote work. To value smaller communities, proximity to family, more affordable housing, and a less-congested quality of life.

In North Carolina, and other states, that value shift translated to a great domestic migration out of urban areas to rural communities at a previously unheard of pace. Rural counties in North Carolina that had sustained population decline

for a decade before the pandemic (such as Warren and Nash Counties) saw a reversal of that trend in 2021. Despite decreasing birth rates and increasing mortality rates in these areas during the same period, they continue to grow as more and more people embrace small towns and the value of life they provide. With rising interest rates pricing many homebuyers out of metropolitan and suburban areas, and seemingly no end in sight for the popularity of remote work, migration to smaller towns is expected to continue. It's also created a recent but strong demand for housing and commercial development to meet the needs of these growing communities. While mainstream development has largely focused on urban areas, those commercial and residential real estate developers following this demand face a variety of unique benefits and incentives. Here are some of the benefits early adopters of the rural development movement can expect based on my experience representing commercial and residential developers following this trend.

## LOWER COST AND BETTER INVENTORY

The inflationary market of materials and rising cost of labor have led to soaring costs of construction for new developments and increased rent pressures in urban areas. These same costs aren't necessarily reflected in rural markets where the cost of living, labor, and ultimately construction are lower. In addition to the lower cost of construction, developers in these communities face a far lower cost of acquisition of existing inventory and far greater availability of raw land compared to the extremely competitive metropolitan or suburban markets. While the lower acquisition costs and available inventory in rural communities might not be new, the population growth in these areas and resulting consumer demand is a recent development that many developers have yet to capitalize on. As a result, compared to similar projects in popular suburban and metropolitan areas, developers can now acquire inventory (raw land included) at a fraction of the cost, build residential homes and

commercial developments for cheaper, and sell or hold with comparable demand and cash flow as similar more expensive projects in urban areas.

This dynamic is particularly true for commercial development of existing structures. Developers can invest in commercial buildings at well below market value, for far less than the cost to build the same structures new construction, and well below the cost to acquire a comparable property in metropolitan areas. And with minimal effort and expense (but far greater incentives than similar projects in metropolitan areas as discussed below), are renovating, revitalizing, and repurposing these structures into modern commercial retail and office spaces, the ever-popular multi-family, and mixed-used developments, often with full occupancy to show for it.

## COOPERATIVE MUNICIPAL GOVERNMENTS

Cooperative small towns and municipal governments condense the timeline and bureaucracy of the development process when they are motivated to encourage projects that will economically benefit the communities they serve. From contract negotiations in private-public development projects to various municipal approvals, project timelines are significantly shortened thanks to this dynamic. For example, whereas zoning matters such as rezoning requests may take up to a year to resolve in larger counties like Wake County, they are often resolved in as little as ninety days in smaller communities. The same can be said for easement approvals, annexation, lot line adjustments, and approvals for planned unit developments – all of which take far less time to obtain with much less bureaucratic hoops to jump through.

Because the development process in rural communities is extremely condensed, the carrying costs are much lower and returns are actualized faster. As an added bonus, some smaller towns are so motivated to encourage development that developers are increasingly successful in negotiating contracts with local government entities to provide public funding

toward development costs such as the construction of parking lots and engineering utilities to planned unit developments. Put simply, there is less red tape and more enthusiasm to see developments in many small towns resulting in shortened project timelines, public funding to subsidize costs, and higher rates of returns.

## FINANCIAL INCENTIVES AND CREATIVE FINANCING

Eligible development projects in rural areas may qualify for numerous grants and tax credits. For example, The Historic Rehabilitation Tax Credit Investment Program is particularly appealing. Founded on the idea that restoration of existing structures and redevelopment into housing, retail and office spaces creates jobs and promotes economic growth, developers receive a tax credit for rehabilitation of existing historic buildings equal to a percentage of the renovation and construction costs. Although available statewide for qualifying projects, the State tax credit is highest for rehabilitation developments in Tier 1 and Tier 2 counties (Warren County, for example) for a total possible tax credit of 20% in addition to the Federal 20%. Thanks to 40% tax credits combined, the return on rural developments can be far higher than comparable projects in urban markets.

Developers may also qualify for grant money similarly geared towards incentivizing economic development in these communities at the State and Federal level - because of the type of industry they are encouraging, location of the development itself, or the number of jobs created upon completion of projects. The variety and availability of grant funds are too numerous to provide examples here but, depending on the project, could cut the cost of construction significantly.

Aside from tax incentives and grants, especially in the commercial arena, we are also seeing seller-financing arrangements explode in popularity in rural markets to the benefit of both parties. The terms of these arrangements vary wildly, are heavily negotiated, and are incredibly transaction specific. However, commercial buyers

generally enjoy lower interest rates (if any), funding that does not contribute to their debt-to-income ratio, and flexible terms without the hassle of traditional underwriting and funding. Sellers enjoy various tax incentives from not actualizing a large lump sum return in a single tax year. From tax incentives and grants to non-traditional funding options, rural development is particularly attractive.

## CONCLUSION

The great domestic migration to rural communities has led to increased demand for real estate development in those markets at both the residential and commercial level. As a result, rural opportunities abound post-COVID in unprecedented ways that developers focused on urban development have not experienced. Cooperative municipal governance, acquisition opportunities, and financial incentives unique to rural development should not be ignored. While market research into particular communities should be done in deciding where to focus development efforts, in many rural areas inventory is easier to acquire, cheaper and faster to develop, with the demand to support healthy returns. ■



### KATIE DOWELL

*Katie Dowell is owner and attorney at Raleigh Real Estate Law with offices in Raleigh, Lake Gaston, and Halifax. A graduate of Campbell Law, Katie's practice focuses on transactional real estate matters, representing clients in residential and commercial purchases and refinances, as well as builders and commercial developers in various development projects across North Carolina. She's also been recognized by her peers and fellow attorneys as Business NC's Legal Elite List for Real Estate Law in 2021 and 2022 as well as Super Lawyers Rising Stars List for 2022 and 2023.*